

The Shaky Ground of Unauthorized Embedding

By [Chanel Lattimer](#) and [Donna Tobin](#)

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A series of recent cases and settlements involving the unauthorized embedding of images into third-party online content have called into question long-held assumptions that embedding did not infringe upon a copyright holder's fundamental right to publicly display their works.

News and media companies frequently use embedding to bolster their online content. One study that analyzed over 1 million online news articles in 2019 found that 23% included an embedded link to a social media post.¹ What is embedding? Simply put, embedding is a process that links content from one site and seamlessly displays it on another site. For the cases at issue, embedding occurred when images that photographers uploaded to social media platforms were displayed, without the permission of or compensation to the photographers, in third-party companies' online articles through embedding tools provided by the social media platform. Social media platforms maintain control of the embedded image, and the image remains on the social media platform's server even when linked and displayed elsewhere.

Companies have typically relied on three assumptions to defend their use of embedding and to counter claims that embedding, without explicit permission, infringes upon the copyright holders' public display rights. First, social media platforms' Terms of Use clearly state that users who upload content grant a sub-licensable license to the social media company to "use" the content, including the ability to host, distribute, publicly perform or display it.² Accordingly, when social media platforms offer tools (APIs) that make embedding easy while also stating that uploaded public content is subject to use by others via said tools³, companies infer that the social media platforms grant them a sublicense to embed content. Second, companies point to the *Perfect 10 v. Google, Inc.* case where the Ninth Circuit held that Google's image search engine which displayed images through inline linking (similar to embedding) did not infringe the copyright holder's display rights because the images were not copied to or stored on Google's server.⁴ The establishment of the "server test" in the *Perfect 10* decision presumes to suggest that as long as an image is hosted on a third-party server, the presentation of the same content

¹ "The State of Social Embeds," SAM, see <https://cdn.samdesk.io/static-content/The-State-of-Social-Embeds.pdf>

² See e.g., Instagram's Terms of Use - <https://help.instagram.com/1215086795543252>

³ See e.g., <https://help.instagram.com/519522125107875>

⁴ 508 F.3d 1146 (9th Cir. 2007)

elsewhere is not infringing. Lastly, companies argue that their use of embedded images in their online articles transforms the images and constitutes fair use. The fair use defense has worked particularly when the article reported on the issues raised in the actual embedded social media post, which happened to include an image.⁵

Three recent cases and a surprise announcement from Facebook (owner of Instagram) place these assumptions and the legality of unauthorized embedding on tenuous ground. In 2018, in *Goldman v. Breitbart News Network, LLC*, a photographer sued Breitbart and other media companies for embedding a tweet that also featured the plaintiff's copyrighted photo of Tom Brady⁶. The New York court rejected the server test as antithetical to the purpose of the display right, which Congress intended to include any form of display regardless of the technology. Further, the court distinguished between situations where users actively chose to display the images, such as by clicking on them (like in *Perfect 10*), and situations where users took no action to see the displayed image beyond accessing the article (embedding). According to the court, the server test was inapplicable to the latter. In rejecting the server test, the court preliminarily ruled that the defendants could be held liable for infringement; however, the case was later settled.

In *McGucken v. Newsweek, LLC*, Newsweek contacted the plaintiff to obtain a license for a photo, but when the plaintiff declined, Newsweek embedded the photo into its article anyway.⁷ Newsweek sought to dismiss the suit on the basis that it had a valid sublicense from Instagram. The court disagreed finding no evidence of an explicit or implicit license; the latter of which requires that the copyright holder create a work with the knowledge and intent that it would be used by another for a specific purpose (embedding). Moreover, the court did not accept Newsweek's fair use defense as there was insufficient transformation (just the image and some token commentary) and the commercial nature of the article, and the mere duplication of the original image presumed market harm to the copyright holder. Just three days after the *McGucken* ruling, technology publication Ars Technica reported the following statement from Facebook: "While our terms allow us to grant a sub-license, we do not grant one for our embeds API. Our platform policies require third parties to have the necessary rights from applicable rights holders. This includes ensuring they have a license to share this content, if a license is required by law."⁸

⁵ See e.g., *Boesen v. United Sports Publications, Ltd.*, No. 20CV1552ARRSIL, 2020 WL 6393010, at *1 (E.D.N.Y. Nov. 2, 2020), *reconsideration denied*, No. 20CV1552ARRSIL, 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020)

⁶ 302 F.Supp.3d 585 (S.D.N.Y. 2018)

⁷ 464 F. Supp.3d 594 (S.D.N.Y. 2020)

⁸ <https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/>

The reverberations of the *McGucken* ruling and Facebook's statement were immediately felt. On June 24, 2020, a New York judge granted a motion for reconsideration in a similar embedding case.⁹ Originally the judge ruled that Instagram's terms did provide a right to display sublicense to third parties via its API and granted the defendant's motion to dismiss. In the reconsideration the judge stated that it was not clear that Instagram's terms gave the defendant the necessary explicit consent to embed. The case was later settled. In October 2020, six photojournalists sued BuzzFeed over the unauthorized embedding and display of their Instagram images from the George Floyd protests¹⁰. As of last month, the plaintiffs have amended their complaint to include the *McGucken* ruling and Facebook's sublicense denunciation.

If the *McGucken* case does not settle, a ruling for the plaintiff would effectively eliminate the sublicense rationale for unauthorized embedding. Nonetheless, additional court rulings, legislation, and technology changes will be necessary to fully clarify the legality of embedding. For instance, *McGucken* does not address the server test and whether it's an applicable defense in embedding cases. Additionally, Facebook has yet to memorialize its June 4th comments into Instagram's Terms of Use or create a mechanism for users to restrict embedding of their content. In the meantime, how should companies who rely upon embedding proceed? Very carefully. It no longer seems safe to simply rely on social media platforms' ambiguous terms and implicit sublicense grants. Fair use of embedded content always remains a defense, but certain types of articles lack sufficient transformation coupled with use for a commercial purpose. Furthermore, giving photo credit (passive permission) to the copyright holder of the embedded work is insufficient. Instagram's embed function automatically gives proper attribution of the owner's username and links to the owner's profile, yet companies are still being sued. Arguably, embedding content from a site that provides users with the option to restrict embedding could be legitimate as one could argue that the copyright holder has provided an implicit license by allowing embedding. Nonetheless, obtaining permission from the copyright holder before embedding their work remains the best practice.

If you have any questions or concerns about the unauthorized embedding of images into third-party online content, [please contact our Trademarks & Brands/Intellectual Property Practice.](#)

⁹ *Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136 (S.D.N.Y. Jun. 24, 2020)

¹⁰ *Hunley et al. v. BuzzFeed, Inc.*, No. 1:20-cv-08844 (S.D.N.Y. filed Oct. 22, 2020)



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